

IN THE SUPREME COURT OF FLORIDA

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STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 85,042

KEVIN WALTER PENDER, ET AL.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Kevin and Clarence Pender were charged in separate informations with sexual battery on a child less than twelve years of age. (R1. 1; R2. 1).¹ After a joint trial, both defendants were found guilty as charged. (R1. 102-03; R2. 80-81). The victim of these crimes was Tara Pender, Clarence's daughter and Kevin's niece.

Kevin and Clarence appealed their convictions to the Fifth District Court of Appeal, which consolidated their cases. The district court ordered a new trial for both defendants, finding that the trial court had committed per se reversible error by failing to conduct a proper Richardson hearing after an alleged discovery violation by the State. Pender v. State, 647 So. 2d 957 (Fla. 5th DCA 1994).

In its opinion, the district court noted that a harmless error analysis was not appropriate in this case, citing to the district court's opinion in Schopp v. State, 641 So. 2d 141 (Fla. 4th DCA 1994), which was pending review in this Court at that time. Pender, 647 So. 2d at 958. This Court has since overturned the lower court's decision in Schopp and held that a harmless error analysis is appropriate in these cases. State v. Schopp, 20 Fla. L. Wkly. S136 (Fla. March 23, 1995).

¹ In this brief, the symbol "R1" will be used to designate the record on appeal for Kevin Pender. "R2" will designate the record for Clarence Pender. "T" will designate the transcript contained in Kevin's record on appeal.

The State timely filed a notice to invoke this Court's discretionary jurisdiction to review the district court's decision. This Court has jurisdiction pursuant to article V, section 3(b)(3) of the Florida Constitution.

STATEMENT OF FACTS

Tara Pender was born on May 31, 1982. (T. 32). Her parents, Clarence and Delois Pender, separated in 1984 and divorced in March of 1988. (T. 162). Tara lived with her mother in an apartment, while Clarence lived with Tara's aunt, Annette. (T. 33-34, 37, 167). Kevin, Clarence's brother, lived with Tara's grandparents, whose house was just a few blocks away from Annette's house. (T. 38-39, 168).

Delois testified that she often left Tara at Tara's grandparent's house or at Annette's house on weekends because she had to work. Tara would sometimes spend the night at one of these houses, usually Annette's. (T. 166-68).

Tara testified that on several occasions when she was staying with her father's family, her father and her uncle Kevin had sex with her. These actions took place in the fall and early winter of 1991, when Tara was in the fourth grade. (T. 42, 56). Upon cross-examination, Tara became somewhat confused as to the exact dates of these events, but she consistently maintained that these actions did in fact take place.

Tara testified that her father, Clarence, pulled down his pants and she took off her clothes; she was then told to lay down on the bed, and Clarence put his penis inside her and moved up and down on top of her. (T. 50-52). Clarence told Tara not to tell anybody. (T. 52).

Tara testified that while at her grandparent's house her uncle Kevin had sex with her in his room. She testified that Kevin put his private part in hers, got on top of her, and moved up and down. (T. 57-58).

Tara did not reveal this abuse until May 24, 1992, when this issue was discussed at school. (T. 59-60). Tara then told her mother, who reported the crimes to the police.

As a part of the investigation of these incidents, Tara was examined by Dr. Penelope Tokarski, a pediatrician who works for the Child Protection Team. (T. 247). Tokarski performed a general physical exam as well as a genital exam. (T. 252-53). In performing the latter exam, Tokarski used a colposcope, a binocular-like instrument which magnifies the area to be examined and allows for the detection of small abnormalities. (T. 253).

Tokarski found on Tara a whitish scar which extended from just outside her hymen to her outer lips. (T. 255). A yellowish cyst was also present in that area. (T. 255). Tokarski drew a diagram for the jury which compared a normal genital area with Tara's. (T. 256-57).

Tokarski concluded that the injury was caused by blunt trauma to the outer genitals. (T. 260). Although Tokarski could tell that the injury was more than 5 days old, she could not determine its origin. (T. 261). Tokarski admitted on cross-examination that the injury could have been caused by masturbation or by falling on a blunt object. (T. 276-77).

Tokarski also found a discharge at the opening of Tara's vagina. (T. 255). This discharge was tested, and Tokarski determined that Tara had chlamydia, a sexually transmitted disease. (T. 262-65). Tokarski concluded that Tara had been exposed to sexual activity. (T. 268).

Tara was treated for her chlamydia with an antibiotic. (T. 266). A person who had chlamydia would test negative in a culture test once he or she had been treated. (T. 266-67). Both Clarence and Kevin tested negative for this disease when tested at the jail nearly a year after Tara reported the abuse. (T. 411-12).

Clarence had an admitted problem with faithfulness to his wife, and he maintained intimate relationships with several women at a time while he was married. (T. 415, 439-40). Clarence had contracted gonorrhea while in the army and had transmitted this disease to his wife. (T. 415, 439).

Both Clarence and Kevin testified at trial, and both denied Tara's accusations. (T. 423, 448). They also testified that they almost never saw Tara and did not spend time alone with her. (T. 424-26, 446-47). The defendants' father, mother, and sister corroborated this testimony, as did Clarence's oldest son, who lived with his grandparents. (T. 313-18, 333-35, 359-60, 373-76).

The jury found Clarence and Kevin guilty of sexual battery on a child less than 12. (R1. 102-03; R2. 80-81). Both defendants were sentenced to life with a twenty-five year minimum mandatory, as required by statute. (R1. 107-09; R2. 84-86).

SUMMARY OF ARGUMENT

The district court's decision granting a new trial should be quashed. The trial court conducted an adequate Richardson hearing in the present case. Moreover, even if the hearing was in some way deficient, any error was harmless. The record reflects that the defendants were in no way prejudiced in their trial preparation or strategy by the failure to provide the colposcope picture.

ARGUMENT

ANY DEFICIENCY IN THE RICHARDSON HEARING
CONDUCTED BY THE TRIAL COURT WAS
HARMLESS ERROR.

Pender argued below, and the district court held, that the trial court erred in failing to conduct a sufficient Richardson inquiry into the State's failure to turn over a photograph of Tara's genital area. The district court's ruling on this issue was incorrect, as the record reflects that the trial court did not "refuse" to conduct a Richardson hearing, but did in fact conduct such a hearing upon request of defense counsel, ultimately finding that there was no prejudice. Such a finding is clearly supported by the record.

In Richardson v. State, 246 So. 2d 771, 774 (Fla. 1971), this Court held that a violation of a rule of procedure, such as a discovery rule, does not require a new trial "unless the record discloses that non-compliance with the rule resulted in prejudice or harm to the defendant." The Court then stated that the trial court has the discretion to determine the appropriate sanction for a rule violation, but noted that such discretion may be properly exercised only after the court has "made an adequate inquiry into all of the surrounding circumstances," including such questions as whether the violation was inadvertent or wilful, trivial or substantial, and whether the violation impeded the defendant's ability to prepare for trial. Id. at 775.

In this case, Dr. Tokarski testified that Tara had a whitish scar and a cyst in her genital area. (T. 255). She then drew a diagram of this injury, comparing the appearance of Tara's

genital area with the appearance of a "normal" area. (T. 256-57). Tokarski testified that this scarring was caused by blunt trauma to the outer genitals. (T. 260).

Tokarski used a colposcope in conducting this examination. (T. 269). This instrument has the ability to take a photograph, and Tokarski did in fact take a photograph in this case. (T. 269). Tokarski discussed the photograph with the prosecutor, but did not give it to him. (T. 270).

After eliciting this information, defense counsel requested a bench conference, which request was granted. (T. 270). At that time, counsel argued that the State had committed a discovery violation. The trial court then conducted an inquiry into the circumstances surrounding the nondisclosure of the photograph and the possible prejudice to the defense. (T. 270-76).

This inquiry revealed that the State assumed the defense would acquire the photograph through a subpoena duces tecum, and therefore did not turn it over directly. The prosecutor had nothing to do with Dr. Tokarski's lack of compliance with that subpoena, nor did the defense ever try to force the doctor to comply with the subpoena.

The trial court found that there had been no discovery violation on the part of the State and noted that there was no evidence of any prejudice to the defense. The court stated that Dr. Tokarski could continue to be examined as to the photograph and whether her description and diagram of what she saw were different from the photograph. (T. 270-76). The court also

noted that if it turned out the photograph had some benefit this issue would form a basis for a motion for new trial. (T. 272-73).

Upon resuming his cross-examination, defense counsel inquired no further of Dr. Tokarski as to the significance of the photograph. Rather, counsel moved on to more relevant subjects, such as the source of the blunt trauma injury and the details of chlamydia. (T. 276-83).

The inquiry discussed above, while never explicitly labeled a Richardson hearing, effectively illuminated the factors deemed relevant to such an inquiry. The State's explanation of its failure to provide the photograph revealed that any discovery violation was inadvertent and trivial. The State assumed the defense would acquire the photograph through its subpoena and had nothing to do with Tokarski's failure to comply with the subpoena. Further, the State never sought to introduce the photograph because the jury would not understand it anyway.

The trial court's inquiry also revealed that the defense was in no way prejudiced by the failure to provide the photograph. This evidence was not introduced at trial, and counsel was obviously aware of the photograph's existence, yet chose not to enforce compliance with its subpoena. Further, counsel did not even attempt to demonstrate that Tokarski's testimony was in any way inconsistent with the photographic evidence, nor did counsel allege any exculpatory value in its motion for a new trial. (R1. 121-22; R2. 94-95). Given these circumstances, the trial court properly found that there had been

no discovery violation, and certainly no prejudice to the defense.

Moreover, even if the trial court's inquiry in this case was deficient in some manner, a new trial is still not warranted. This Court has recently reconsidered the wisdom of a per se reversible error rule for the failure to conduct a Richardson hearing and has concluded that such a rule is not necessary in this context, noting that continued application of such a rule would have the effect of elevating form over substance. State v. Schopp, 20 Fla. L. Wkly. S136, S138 (Fla. March 23, 1995). Accordingly, the failure to conduct an adequate Richardson hearing is, like virtually all other trial error, subject to a harmless error analysis. Id.

In the case of a discovery violation by the State, the purpose of the Richardson inquiry is to ferret out procedural prejudice to the defense from the State's nondisclosure. Id. at S137. Therefore, in conducting a harmless error analysis of the trial court's failure to hold such an inquiry, the appellate court must determine whether there is a reasonable possibility that the discovery violation procedurally prejudiced the defense -- that is, whether the defendant's trial preparation or strategy would have been materially different had the violation not occurred. Id. at S138.

In this case, the record reflects that the defendants' trial preparation and strategy were not affected by the failure to provide the colposcope photograph. The State never attempted to introduce the photograph into evidence, so the defendants

cannot claim they were in any way unprepared for or surprised by the evidence at trial. Moreover, Tokarski never even mentioned the photograph until defense counsel asked her about it.

Counsel's vague statement that without having the photograph he was not able to consult with experts as to that part of the defense does not establish prejudice. (T. 275). The record reflects that Dr. Tokarski was disclosed as a State witness over seven months before trial, and she was deposed by the defendants nearly four months before trial. (R1. 27, 74; R2. 15). The defendants were well aware of Tokarski's findings and the existence of the photograph before trial, and they were fully prepared for her testimony. They did not need the photograph in order to effectively prepare, as is evidenced by counsel's performance at trial. Tokarski was extensively and effectively cross-examined as to her findings, and she affirmatively admitted that the injury she saw could have been caused by something other than sexual battery, such as masturbation or falling on a blunt object. (T. 276-77).

Further, the defendants essentially conceded that Tara had been in sexual contact with someone -- the real question in this case was who that person(s) was. Dr. Tokarski's testimony shed little light on this issue, and in fact was used in the defendants' favor, since they both tested negative for chlamydia.

There is no reasonable possibility that the failure to provide the colposcope photograph procedurally prejudiced the defense in its trial preparation or strategy. See Schopp, 20 Fla. L. Wkly. at S138. The district court's decision granting the defendants a new trial should be quashed.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully requests this honorable Court quash the decision of the district court granting respondents a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Petitioner's Brief has been furnished to Noel A. Pelella, Assistant Public Defender, by delivery to the Public Defender's basket at the Fifth District Court of Appeal, this 2nd day of May, 1995.



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